Public Prosecutor v Peter Kong

HIGH COURT (KUCHING) — CRIMINAL TRIAL NO 45–11 OF 2005–II
HAMID SULTAN JC
18 JUNE 2007

Criminal Procedure — Dangerous Drugs — Trafficking — Whether accused guilty of trafficking — Whether prosecution proved possession of drugs and trafficking — Dangerous Drugs Act 1952 ss 12(2), 37(d), 37(da), 39B(1)(a)

Evidence — Relevancy — Motive — Whether accused person's motive relevant — Evidence Act 1950 s 8

The accused was charged for committing an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA'). On 14 May 2005, the apartment that the accused was occupying was raided and a green bag suspected of containing drugs was recovered from a cupboard. The accused was arrested and the drugs were sent to the chemist who later confirmed that it was methamphemine (127.14g). The prosecution relied on evidence of one bail bond found in the accused person's bag. The defence argued that it had been planted there to implicate the accused. The bail bond contained the name of the accused in respect of another offence. It was the prosecution's attempt to link the drugs to the accused by virtue of the bail bond. The defence also submitted that the chemist did not take sufficient samples for the analysis and thus did not satisfy the standard.

Held, amending the charge to possession under s 12(2) of the DDA and inviting the prosecution to propose suitable amendments:

(1) It is not appropriate to introduce a document which will tend to implicate the bad character of the accused as well as to show that he was involved in another offence. To some extent the law of evidence in relation to motive permits the court to allow evidence to show the alleged motive for a crime even though such evidence may suggest the commission of another crime by the accused. This is captured in s 8 of the Evidence Act 1950 ('EA'). Under s 8, the following facts are relevant namely: (i) facts which show motive; (ii) facts that reveal preparation; (iii) facts which divulge previous or subsequent conduct of any person, provided if it is influenced by any fact in issue or relevant fact; (iv) statement accompanying and explaining acts; (vi) statements made in the presence and hearing of a person whose conduct is relevant provided the statement affects such conduct. When a case depends entirely upon circumstantial evidence, the issue as to motive becomes important (see paras 5–7).

(2) The raiding officer who prepared the search list did not, in the list, state that there was anything recovered from the purse of the accused. There was an allegation by the defence that there was more than RM1,000 in the purse and not accounted for by the police The raiding officer did not disclose during his examination-in-chief that the purse was searched to look for incriminating evidence. Any reasonable police officer arresting a person for a drug offence would search the purse of the accused to see whether there was any incriminating evidence or information in the purse relating to the drugs. The information in the purse was conveniently hidden from the purview of the court until cross-examination and the money or the purse was not accounted for at the end of the prosecution case, notwithstanding the accused at all material time was in the custody of the police. This shook the credibility of the prosecution's case so far as it related to the bail bond to implicate the accused and show that there was actual possession without the need for them to rely on s 37(d) of the DDA. This also affected the credibility of the prosecution witness to establish the overt acts of the accused for the court to infer that the accused had knowledge of the drug (see para 13(iii)).

(3) The green bag only had the drugs and the bail bond. It was difficult to envisage why the accused would have placed the bail bond in that folded manner with the drugs. It was more probable that the bail bond was recovered from the purse and conveniently placed in the green bag. The prejudicial effect of the bail bond against the accused outweighed its probative value. The bail bond was expunged from the records (see para 13(iv)–14).

(4) The court accepted the evidence of the chemist as it found no reason to reject his evidence at that stage (see para 16); *Gunalan a/l Ramachandran & Ors v Public Prosecutor* [2004] 4 MLJ 489 followed.

(5) The prosecution had no evidence to ground the charge for trafficking. It could not rely on the double presumption in view of *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273, ie that the presumption of possession under s 37(d) of the DDA could not be applied to invoke the presumption of trafficking under s 37(da) of DDA. The prosecution did not adduce any evidence of trafficking as set out in s 2 of the DDA. Since the prosecution failed to establish a prima facie case for trafficking, the accused was entitled in law to seek for an acquittal (see paras 20–21, 26).

[Bahasa Malaysia summary

Tertuduh telah dituduh melakukan kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'). Pada 14 Mei 2005, apartmen yang tertuduh menginap telah diserbu dan sebuah beg berwarna hijau mengandungi dadah telah ditemui dari sebuah almari. Tertuduh telah ditangkap dan dadah tersebut telah dihantar kepada ahli kimia yang kemudiannya mengesahkan ianya adalah methamphemine (127.14g). Pihak pendakwaan bergantung kepada bukti satu bon jaminan yang dijumpai dalam beg tertuduh. Pihak pembelaan berhujah bahawa ia telah diletakkan di situ untuk membabitkan tertuduh menurut bon jaminan tersebut. Pihak pembelaan juga berhujah bahawa ahli kimia tidak mengambil sampel yang mencukupi untuk analisis dan oleh demikian tidak memenuhi piawai.

Diputuskan, meminda pertuduhan kepada pemilikan di bawah s 12(2) ADB dan meminta pihak pendakwaan mencadangkan pindaan yang sesuai:

(1) Ia tidak sesuai untuk memperkenalkan suatu dokumen yang akan membabitkan sifat tidak baik tertuduh yang juga akan menunjukkan bahawa beliau terlibat dalam kesalahan lain. Setakat ini undang-undang keterangan berkaitan motif membenarkan mahkamah membenarkan keterangan untuk menunjukkan motif yang dikatakan untuk satu jenayah meskipun keterangan sedemikian mungkin mencadangkan perlakuan jenayah lain oleh tertuduh. Ini terdapat dalam s 8 Akta Keterangan 1950 ('AK'). Di bawah s 8, fakta-fakta berikut adalah relevan terutamanya: (i) fakta-fakta yang menunjukkan motif; (ii) fakta-fakta yang menunjukkan persediaan; (iii) fakta-fakta yang menunjukkan perbuatan sebelum dan selepas seseorang, dengan syarat jika ia dipengaruhi oleh mana-mana fakta yang dipersoalkan atau fakta yang berkaitan; (iv) kenyataan yang disertai dan dijelaskan dengan perbuatan; (vi) kenyataan yang dibuat dalam kehadiran dan pendengaran seseorang yang mana perbuatannya adalah relevan dengan syarat kenyataan tersebut menjejaskan perbuatan sedemikia. Apabila suatu kes bergantung kepada keseluruhan keterangan mengikut keadaan, persoalan berhubung motif adalah penting (lihat perenggan 5–7).

(2) Pegawai yang membuat serbuan yang telah menyediakan senarai carian tidak, dalam senarai itu, menyatakan bahawa terdapat apa-apa yang dijumpai dalam dompet tertuduh. Terdapat pengataan oleh pihak pembelaan bahawa terdapat lebih daripada RM1,000 dalam dompet itu dan tidak diambilkira oleh pihak polis. Pegawai serbuan tidak mendedahkan semasa pemeriksaan utama beliau bahawa dompet itu telah diperiksa untuk mencari bukti yang beliau bersalah. Seorang pegawai polis munasabah yang menangkap seseorang untuk kesalahan dadah akan memeriksa dompet tertuduh untuk melihat sama ada terdapat apa-apa bukti atau maklumat dalam dompet itu berkaitan dadah yang menunjukkan beliau bersalah. Maklumat dalam dompet telah disembunyikan dengan sengaja daripada skop mahkamah sehingga pemeriksaan balas dan wang atau dompet itu tidak diambilkira sehingga di akhir kes pendakwaan, meskipun tertuduh pada setiap masa matan berada dalam kawalan polis. Ini menggugat kebolehpercayaan kes pihak pendakwaan setakat mana ia berkaitan dengan bon jaminan untuk membabitkan tertuduh dan menunjukkan bahawa terdapat pemilikan sebenar tanpa perlu untuk mereka bergantung kepada s 37(d) ADB. Ini juga menjejaskan keboleh percayaan saksi pihak pendakwaan untuk membuktikan perbuatan terang-terangan tertuduh agar mahkamah membuat inferens bahawa tertuduh mempunyai pengetahuan tentang dadah tersebut (lihat perenggan 13(iii)).

(3) Beg hijau itu hanya terdapat dadah dan bon jaminan tersebut. Adalah sukar untuk membayangkan kenapa tertuduh meletakkan bon jaminan itu dalam bentuk lipatan dengan dadah tersebut. Adalah berkemungkinan bahawa bon jaminan itu dijumpai daripada dompet itu dan dengan mudah diletakkan dalam beg hijau itu. Kesan prejudis bon jaminan itu terhadap tertuduh melebihi nilai probatifnya. Bon jaminan itu telah dihapuskan daripada rekod (lihat perenggan 13(iv)–14).

(4) Mahkamah telah menerima keterangan ahli kimia kerana ia mendapati tiada alasan untuk menolak keterangannya pada peringkat itu (lihat perenggan 16); *Gunalan a/l Ramachandran & Ors v Public Prosecutor* [2004] 4 MLJ 489 diikut.

(5) Pihak pendakwaan tiada keterangan untuk memutuskan suatu pertuduhan pengedaran. Ia tidak boleh bergantung kepada andaian berganda menurut *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273, iaitu bahawa andaian pemilikan di bawah s 37(d) ADB tidak boleh terpakai untuk mewujudkan andaian pengedaran di bawah s 37(da) ADB. Pihak pendakwaan tidak mengemukakan apa-apa keterangan pengedaran seperti yang ditetapkan dalam s 2 ADB. Memandangkan pihak pendakwaan gagal untuk membuktikan kes prima facie pengedaran, tertuduh berhak dasi segi undang-undang memohon suatu pembebasan (lihat perenggan 20–21, 26).]

Notes

For a case on motive, see 7(1) *Mallal's Digest* (4th Ed, 2006 Reissue) para 2250. For cases on trafficking, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 126–137.

Cases referred to

Balachandran v PP [2005] 2 MLJ 301 (refd)
Boota Singh v PP [1933] 2 MLJ 195 (refd)
Chu Tak Fai v PP [2007] 1 MLJ 201 (refd)
Goi Ching Ang v PP [1999] 1 MLJ 507 (refd)
Gunalan a/l Ramachandran & Ors v PP [2004] 4 MLJ 489 (folld)
Harris v Director of Public Prosecutions [1952] AC 694 (refd)
Kuruma v The Queen [1955] AC 197 (refd)
Lee Chee Meng v PP [1992] 1 MLJ 322 (refd)
Leow Nghee Lim v Reg [1956] MLJ 28 (refd)
Lim Kong v PP [1962] MLJ 195 (refd)
Mohamad Fauzi bin Ridwan v PP [2006] 2 MLJ 15 (refd)
Mohamed bin Kasi v Public Prosecutor [1969] MLJ 135 (refd)
Muhammed bin Hassan v PP [1998] 2 MLJ 273 (refd)
Munusamy v PP [1987] 1 MLJ 492 (refd)
Msimanga Lesaly v PP [2005] 4 MLJ 314 (refd)
Nath Singh v R [1949] Madras Law Journal 297 (refd)
Noor Mohamed v The King [1949] AC 182 (refd)
PP v Ang Boon Foo [1981] 1 MLJ 41 (refd)
PP v Chew Yoo Choi [1990] 2 MLJ 444 (refd)
PP v Chia Leong Foo [2000] 6 MLJ 705 (refd)
PP v Geoffrey Chambers & Anor [1986] 1 CLJ 441 (refd)
PP v Lai Ah Bee [1974] 2 MLJ 74 (refd)
PP v Lim Chang Ming [1990] 2 MLJ 497 (refd)
PP v Mohd Farid bin Mohd Sukis & Anor [2002] 3 MLJ 401 (refd)
PP v Ong Cheng Heong [1998] 6 MLJ 678 (refd)
PP v Ooi Teng Chian [2006] 1 MLJ 213 (refd)
PP v Sim Ah Ba & Anor [1997] 4 MLJ 47 (refd)
PP v Sukumaran a/l Sudram [1994] 4 MLJ 462 (refd)
PP v Suzie Adrina bte Ahmad [2006] 5 MLJ 135 (refd)
PP v Tahir bin Kassim [1985] 1 MLJ 381 (refd)

A *PP v Tan Kim Piow* [2006] 5 MLJ 409 (refd)
PP v Tan Seow Chuan [1985] 1 MLJ 318 (refd)
PP v Tan Tatt Eek & other appeals [2005] 2 MLJ 685 (refd)
PP v Tang Chew Weng [1969] 2 MLJ 17 (refd)
PP v Yap Hai Ling [1990] 1 CLJ 983 (refd)
B *Pendakwa Raya v Ismail bin Atan* [1992] 2 CLJ 1253 (refd)
Poon Soh Har & Anor v PP [1977] 2 MLJ 126 (refd)
Reza Mohd Shah Ahmad Shah v PP [2005] 4 CLJ 581 (refd)
Toh Ah Loh and Mak Thim v Rex [1949] MLJ 54 (refd)
Wjchai Onprom v PP [2006] 5 MLJ 415 (refd)
C *Wong Foh Hin v PP* [1964] MLJ 149 (refd)
Wong Swee Chin v PP [1981] 1 MLJ 212 (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 2, 12(2), 37(d), 37(da), 39A(2), 39B(1)(a)
Evidence Act 1950 ss 3, 8
D Federal Constitution art 5(1)

Steve Ritikos (Deputy Public Prosecutor, Attorney General's Chambers, Sarawak) for the prosecution.
Osman bin Ibrahim (Osman Ibrahim Advocates) for the accused.

E **Hamid Sultan JC:**

[1] This is my judgment in respect of the accused's submission that the prosecution has failed to establish a prima facie case pursuant to section 180 of the
F Criminal Procedure Code ('CPC').

[2] The accused was charged for committing an offence under section 39B(1)(a) of the Dangerous Drugs Act 1952 (DDA 1952) which reads as follows:

G > That you, on the 14th day of May, 2005 at about 2.20p.m. at Room No B303, Block B, JinHold Service Apartment, Lot 11258 Block 11 MTLD, Jalan Song, Kuching, in the State of Sarawak did traffic in dangerous drugs, to wit, 127.14g of Methamphetamine, which is listed in the first schedule of the Dangerous Drug Act 1952(Act 234), without any authorization and you thereby committed an offence under s 39B(1)(a) of Dangerous Drug Act 1952 and punishable under s 39B(2) of the same Act.

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[3] The prosecution and the defence have relied on the following authorities: (i) *Balachandran v Public Prosecutor* [2005] 2 MLJ 301; (ii) *Public Prosecutor v Chia Leong Foo* [2000] 6 MLJ 705; (iii) *Mohamad Fauzi bin Ridwan v Public Prosecutor* [2006] 2 MLJ 15; (iv) *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212;
I (v) *Public Prosecutor v Tan Kim Piow* [2006] 5 MLJ 409; (vi) *Public Prosecutor v Tahir bin Kassim* [1985] 1 MLJ 381; (vii) *Wjchai Onprom v Public Prosecutor* [2006] 5 MLJ 415; (viii) *Public Prosecutor v Sim Ah Ba & Anor* [1997] 4 MLJ 47; (ix) *Public Prosecutor v Sukumaran a/l Sudram* [1994] 4 MLJ 462; (x) *Public Prosecutor v Lim Chang Ming* [1990] 2 MLJ 497; (xi) *Public Prosecutor v Lai Ah Bee* [1974] 2 MLJ 74; (xii) *Public Prosecutor v Yap Hai Ling* [1990] 1 CLJ 983; (xiii) *Public Prosecutor v*

Mohd Farid bin Mohd Sukis & Anor [2002] 3 MLJ 401; (xiv) *Lee Chee Meng v Public Prosecutor* [1992] 1 MLJ 322; (xv) *Public Prosecutor v Ong Cheng Heong* [1998] 6 MLJ 678; (xvi) *Public Prosecutor v Ang Boon Foo* [1981] 1 MLJ 41; (xvii) *Leow Nghee Lim v Reg* [1956] MLJ 28; (xviii) *Toh Ah Loh and Mak Thim v Rex* [1949] MLJ 54; (xix) *Public Prosecutor v Tang Chew Weng* [1969] 2 MLJ 17; (xx) *Public Prosecutor v Tan Seow Chuan* [1985] 1 MLJ 318; (xxi) *Public Prosecutor v Geoffrey Chambers & Anor* [1986] 1 CLJ 441; (xxii) *Goi Ching Ang v Public Prosecutor* [1999] 1 MLJ 507; (xxiii) *Public Prosecutor v Chew Yoo Choi* [1990] 2 MLJ 444; (xxiv) *Public Prosecutor v Ooi Teng Chian* [2006] 1 MLJ 213; (xxv) *Mohamed bin Kasi v Public Prosecutor* [1969] MLJ 135; (xxvi) *Gunalan a/l Ramachandran & Ors v Public Prosecutor* [2004] 4 MLJ 489; (xxvii) *Pendakwa Raya v Ismail bin Atan* [1992] 2 CLJ 1253.

[4] The prosecution called 12 witnesses and the brief fact of the prosecution's case can be summarised as follows: (i) On 14 May 2005 a police party upon information raided a room at No 303 B at Jinhold Service Apartment, Jalan Song, Kuching. (ii) The accused was the only occupant of the room. The raiding party recovered a green bag suspected of containing drugs from one of the cupboards of the room. The accused was arrested. At the time of the arrest the accused purportedly was agitated and wanted to escape. Later the drugs were sent to the chemist, who confirmed that it was methamphetamine weighing 127.14g. To contend that the drugs belonged to the accused, the prosecution were heavily relying on one bail bond found in the bag which has his name. The defence had severely objected to this piece of evidence on the grounds that the bail bond was planted by the police for the prosecution to succeed in the charge. The objections were not without reasons because the bail bond was folded several times to the size of an identity card suitable to be kept in a purse. The contention of the defence was that the bail bond was removed from the purse and placed in the bag to implicate the accused.

[5] At the time that the prosecution recovered the green bag where the drug was found, the prosecution says that there was a document. The document was a bail bond having the name of the accused in respect of another offence. I immediately informed the prosecution it is not appropriate to introduce a document which will tend to implicate the bad character of the accused as well as to show that he was involved in another offence. Support for this proposition is found in many cases. In *Poon Soh Har & Anor v Public Prosecutor* [1977] 2 MLJ 126, the Singapore Criminal Court of Appeal opined (at p 127):

> In our judgment the evidence in respect of past criminal activities of the appellants was inadmissible. It offended against the principle laid down in *Makin v Attorney-General of New South Wales* [1894] AC 57, in that first, it plainly tended to show that the appellants had been guilty of criminal acts other than that with which they were charged, for the purpose of leading to the conclusion that they were persons likely from their criminal conduct or character to have committed the offence for which they were being tried, and secondly, it could not be said to be relevant to any issue in the case. Because of the precise definition of 'traffic' in s 2 of the Act which is restricted to the commission of a number of specific acts, evidence of such past acts was irrelevant as it could not prove the offence of trafficking on the day and time in question. The fact that the appellants had trafficked in heroin in the past did not mean that they were trafficking when arrested. Evidence of trafficking in heroin in the past merely raised the suspicion that they were having the heroin for purposes of

A trafficking and did not prove that they 'did traffic' on the day in question. The admission of evidence of past criminal acts could not be justified on any ground and should have been rejected.

B **[6]** I must say here to some extent the law of evidence in relation to motive permits the court to allow evidence to show the alleged motive for a crime even though such evidence may suggest the commission of another crime by the accused. This aspect of the law is captured in s 8 of the Evidence Act 1950 ('the EA'). Evidence of motive is relevant. Under s 8, the following facts are relevant namely: (i) facts which show motive; (ii) facts that reveal preparation; (iii) facts which divulge previous or subsequent conduct of any person, provided if it is influenced by any fact in issue or C relevant fact; (iv) statement accompanying and explaining acts; (vi) statements made in the presence and hearing of a person whose conduct is relevant provided the statement affects such conduct. Motive is that which induces a person to do a particular act. Every voluntary act has a motive. Motive and intention must be distinguished. A person's intention is his decision to do or not to do a particular act, D but his motive is the reason for forming that decision. For example, when a poor woman with a child steals a loaf of bread, her intention is to steal but her motive may be to feed her child. Thus, motive is the emotion supposed to have led to the act. It is a psychological fact, which can be proved by the conduct of the accused. However, it is not always possible to discover motive behind an act but this does not mean that E motive was absent.

[7] Evidence of motive is relevant and material in criminal cases. However, where there is direct evidence and clear proof that the accused has committed the crime, the question of motive becomes irrelevant to sustain the conviction. When a case depends entirely upon circumstantial evidence, the issue as to motive becomes F important.

[8] In *Nath Singh v R* [1949] Madras Law Journal 297, it was held that the evidence to show alleged motive for a crime is admissible even though such evidence suggests the commission of another crime by the accused. In this case, the accused G was tried for the murder of Karnail Singh. Evidence was led to show that Karnail Singh was extorting money from the accused on the grounds that he knew the accused had killed one Bhan Singh. This fact was admitted to show motive for the murder. However, it needs to be emphasized here that motive is not admissible in such situations if it is for showing that the accused was likely to have committed the H offence. Further, motive to infer bad character of the accused may not be relevant under s 54 of the EA.

[9] In *Boota Singh v Public Prosecutor* [1933] 2 MLJ 195, a previous police report was ruled admissible under s 8 to prove motive for a subsequent crime. Terrel Ag C J observed:

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> In this case a report made by the deceased against the prisoner nine months before the murder was admitted in evidence by the trial Judge, as showing a motive for the crime. Counsel for the appellant argued:

(a) that the report was inadmissible under any section of the Evidence Ordinance; and

(b) that if it was wrongly admitted, it must have influenced the whole course of the trial, and that the accused was entitled to an acquittal.

The report was, however, put forward by the prosecution as showing or constituting motive under s 8. It indicated that the deceased was on bad terms with the accused, and supported the oral evidence to the same effect. The conduct of the deceased in making a report against the accused is made relevant by the express terms of s 8. Generally speaking, a statement is not 'conduct' within the meaning of the section, but in this case the statement accompanied and explained the deceased's act in making the report. It is accordingly expressly admissible in terms of Explanation (i) of s 8.

It should be added that the report is not evidence of the truth of the deceased's allegation against the prisoner. It was admitted in evidence by the prisoner's counsel at the trial, and although this is by no means conclusive that the report should be admitted, it is I think clear that the reason why counsel admitted the report was because it was brought out in evidence that after the subject matter of the report had been investigated, no action was taken by the police, and this was pro tanto favourable to the prisoner, and it can be presumed in the prisoner's favour that the deceased's allegation were not true. The fact however that the report was made still remains and is admissible as showing the relations between the parties and in support of the motive alleged by the prosecution.

[10] In *Lim Kong v Public Prosecutor* [1962] MLJ 195, the evidence of financial insecurity was made admissible under section 8 to show motive for kidnapping. Adams J observed:

In this case a report made by the deceased against the prisoner nine months before the murder was admitted in evidence by the trial Judge, as showing a motive for the crime. Counsel for the appellant argued:

(a) that the report was inadmissible under any section of the Evidence Ordinance; and

(b) that if it was wrongly admitted, it must have influenced the whole course of the trial, and that the accused was entitled to an acquittal.

Kan Chow deposed that the accused had an outstanding debt for petrol supplied since 1959 of some $1,200. Tan Oon Cheng gave evidence that the accused had borrowed $4,000 to replace a diesel engine in SR 6959 and that he was in arrears of his installments in January and February, Mr Marshall also referred to cross-examination of the accused along similar lines. It was not disputed and is in fact shown on the record that this evidence and cross-examination were introduced to show that the accused was in a state of financial embarrassment and the learned Deputy pointed out in his reply to Mr Marshall that this evidence was admissible under s 8 of the Evidence Ordinance 1950 to prove motive. Mr Marshall argued, however, that it was purely evidence of bad character and was therefore inadmissible by virtue of s 54 of the Evidence Ordinance. With respect to Mr Marshall I do not think that evidence of financial embarrassment is necessarily evidence of a bad character within the meaning of s 54. Furthermore, the evidence of financial instability supported equally the case for the defence as evidence of motive for the prosecution. Where a crime is financial, as this one is in part, evidence that the accused was being pressed to find money to satisfy his debts is relevant as tending a show a possible motive ….

[11] In *Wong Foh Hin v Public Prosecutor* [1964] MLJ 149, the Federal Court allowed the previous incestuous relationship of the accused (father) with the deceased (daughter) to prove motive for the murder. The fact of the case was that the appellant

was convicted of the murder of his daughter. Evidence was admitted at the trial of an incident three months before the daughter's death where the wife had complained to the village headman that the appellant had 'interfered' with his daughter and that the matter had been disposed of by the village headman stating that if this occurred again the matter would be reported to the police. On appeal, the sole question was whether the evidence of the above incident and also evidence of a similar incident just before the daughter's death were properly admitted. It was contended for the appellant that: (i) the evidence of the incidents which suggested an incestuous relationship between the appellant and his daughter amounted to evidence of bad character and was therefore inadmissible; (ii) and alternatively if it was admissible the trial judge should have exercised his discretion to exclude it on grounds that it's prejudicial effect far outweighed its probative value.

[12] The court held that the evidence of the incidents was admissible. It was not rendered inadmissible merely because it tended to show bad character or the commission of another offence. The court stated that in this case, as there was only circumstantial evidence of the murder, strong and convincing evidence of motive would probably have high evidential value. Further, the court stated that the trial judge was therefore correct in not exercising his discretion in favour of excluding evidence of the incidents on the ground that its prejudicial effect would be out of proportion to its evidential value.

[13] The prosecution's attempt to link the accused to the drugs by virtue of the bail bond found in the bag, to me is unacceptable for various reasons:

(i) The bail bond was found in a folded manner in the size of identity card. It was the contention of the defence that it has been removed by one of the members of the raiding party to link the accused with the drugs.

(ii) By placing the bail bond related to another offence relating to drugs is an attempt to show that the accused had knowledge of the nature of the said drugs.

(iii) The raiding officer who prepared the search list did not in the search list state that there was anything recovered from the purse of the accused. However, there was allegation by the defence that there was more than RM1,000 in the purse and not accounted for by the police. The raiding officer did not disclose during his examination-in-chief that the purse was searched to look for incriminating evidence. I would have expected any reasonable police officer arresting a person for a drug offence to search the purse of the accused to see whether there is any incriminating evidence or information in the purse relating to the drugs. The information in the purse was conveniently hidden from the purview of the court until cross-examination and the money or the purse was not accounted for at the end of the prosecution case, notwithstanding the accused at all material time was in the custody of the police. This surely goes to shake the credibility of the prosecution case so far as it relates to the bail bond to implicate the accused and show that there was actual possession without the need for them to rely on s 37(d) of the DDA.

This also affects the credibility of the prosecution witness to establish the overt acts of the accused for the court to infer that the accused had knowledge of the drug.

(iv) Further, the green bag had only the drugs and the bail bond. It is difficult to envisage why the accused would have placed the bail bond in that folded manner with the drugs. It is more probable that the bail bond was recovered from the purse and conveniently placed in the green bag.

[14] The evidence of bail bond and the manner in which it was discovered is of great suspect. In criminal case, the trial judge always has a discretion to disallow evidence, if the strict rules of admissibility will operate against an accused (see *Kuruma v The Queen* [1955] AC 197; *Noor Mohamed v The King* [1949] AC 182; *Harris v Director of Public Prosecutions* [1952] AC 694). In this case, the prejudicial effect of the bail bond against the accused outweighs its probative value. In *Msimanga Lesaly v PP* [2005] 4 MLJ 314, Gopal Sri Ram JCA asserted that, 'Of course, a trial judge has the discretion to exclude evidence the prejudicial effect of which outweighs its probative value.' In consequence, I rule that the bail bond, be expunged from the records.

[15] It was also severely contended by the defence that the analysis of the drug by the chemist did not satisfy the required standard and the chemist did not take sufficient sample for the analysis and in consequence his evidence should be rejected. In *Munusamy v Public Prosecutor* [1987] 1 MLJ 492, the Supreme Court on the facts opined (at p 496):

> On the above evidence, we find it difficult to appreciate the validity of various criticisms leveled at Mr Ng. There was no dispute that Mr. Ng had been a chemist with the Chemistry Department for 12 years. He possessed a BSc. degree in Chemistry and Biology, and had given expert evidence in court, and such evidence had been accepted in the High Court in drug cases. As a rule, a chemist in drug cases does not give any opinion as to ownership, control or possession of the substance sent for analysis, but he merely reports the result of the chemical examination of the substance. The only reason for sending the exhibits to the chemist is to determine their identity and to confirm what other witnesses have suspected. This type of opinion must in our view be distinguished from opinions which are of very technical or complicated nature, such as those given by handwriting, trade mark, copy right or ballistic experts. Without being derogatory it is common knowledge that even animals, such as sniff dogs when sufficiently trained, are able to detect certain dangerous drugs. We are therefore of the view, that is this type of cases where the opinion of the chemist is confined only to the elementary nature and identity of substance, the court is entitled to accept the opinion of the expert on its face value, unless it is inherently incredible or the defence calls evidence in rebuttal by another expert to contradict the opinion. So long as some credible evidence is given by the chemist to support his opinion, there is no necessity for him to go into details of what he did in the laboratory, step by step. We are deeply concerned with the laxity in which the trial judge had allowed Mr Ng to be examined and cross-examined for nearly two days. In his judgment, the learned judge observed that Mr Ng was subjected to vigorous cross-examination and that he withstood the barrage of questions stoically and emerged unscratched. We are unable to see the purpose of putting the chemist through such ordeal although we note that he was also cross-examined on other issues in which he had no expert knowledge. The uncontradicted evidence of Mr Ng which we have cited earlier, is more than sufficient to prove that all the 1,400 rolls sent to him by the police contained a total of 649.5g of cannabis, and there is no necessity to enlighten the court on

A the details in respect of each of the two packages. Two High Court cases on s 370(j) decided by Anuar J. have been referred to us — *Public Prosecutor v Teyu Baba*, *Teo Boo Bak* Perak Criminal Trial No 13 of 1980 and *Public Prosecutor v Lau Hing*, *Low Beng Heng & Anor* Perak Criminal Trial No 2 of 1981. We note that the facts in both cases are entirely different because the prosecution were in fact relying on the presumption of that subsection. It is not so in the case before us. Further in *Lau Hing* case the chemist who gave evidence was found
B to be not an expert and accordingly the appeal of the Public Prosecutor against acquittal was dismissed. In *Teyu Baba* case the accused was acquitted without his defence being called on the ground that the chemist failed to state in his report that the substance which he analysed was 'candu' within the meaning of the Act. There the chemist was not called to give evidence and since the appeal by the Public Prosecutor is still pending, it should be dealt with at the appropriate time, when the respondent is traced. As regards the method of weighing, Mr Ng
C obtained the weight of the cannabis by subtracting the weight of the rolls last cover (i.e. paper wrapper together with label and rubber bands on the wrapper) from the gross weight of the 1,400 rolls. There should be no objection to such method. To quote the analogy of the learned judge, it is not necessary to weigh an actual ship in order to obtain its weight. In our view, there was no necessity to invoke the presumption under section 37(j), since the chemist's opinion was emphatic that the whole 649.5g of the vegetative
D substance was cannabis. Further it is too far fetched to refer to each of the 1,400 rolls as "receptacles" for the purpose of that subsection.

In *Gunalan a/l Ramachandran & Ors v PP* [2004] 4 MLJ 489, the Court of Appeal held:

E [10] In *Leong Boon Huat v PP* the court did not lay down the rule that 10% of the total weight of the plant material must be taken as sample for the purpose of tests. However, in the circumstances of that particular case the amount taken was found to be adequate by the court. In the absence of a specific provision of the law, it should be the chemist who determines the adequate quantity that should be taken as samples for the purpose of carrying out tests. *Leong Boon Huat v PP* is not an authority for saying that the law requires
F that 10% of the total weight of the drug must be tested. There is no provision whatsoever in the DDA which requires at least 10% of the total weight of the substance in question be taken out for the purpose of analysis. The 10% mentioned in s 37(j) of the DDA refers to 'receptacles' when the drug is contained in a number of receptacles, not to the weight, and not where the drug is found in one package only (see *PP v Lam San* [1991] 3 CLJ 2410; [1991] 1 CLJ (Rep) 391 (SC) (folld); *Au Ah Lin v PP*[1963] MLJ 365 (FC) (folld); *Leong*
G *Boon Huat v PP* [1993] 3 MLJ 11 (not folld); *Loo Kia Meng v PP* [2000] 3 CLJ 653 (CA)].

In *Chu Tak Fai v Public Prosecutor* [2007] 1 MLJ 201, the Federal Court opined (at p 215):

H It is clear therefore that there is no requirement for the amount or the weight of the samples of the drug to be taken for the purpose of analysis by the chemist. It is up to the chemist to carry out the analysis scientifically. It is also for the chemist to determine the adequacy of samples for the purpose of analysis. If the defence wishes to challenge the sufficiency of the weight of the drug analysed the chemist's evidence must be challenged and evidence in rebuttal must be led, if necessary.

I Further, in *PP v Suzie Adrina bte Ahmad* [2006] 5 MLJ 135, the Court of Appeal asserted that (at p 143):

Further, even on the basis accepted by the learned judge that the prosecution had established that the weight of the drug in question was 2.332g, he ought nevertheless to have called for the defence. This is because, as we have already said, the prosecution had here established

a prima facie case of actual trafficking. And where an accused is shown to be a trafficker under s 39(B)(1)(a) of the Act, the weight of the drug he or she carries has no bearing whatsoever on his commission of the offence.

[16] I have gone through the evidence of the chemist in detail. I am inclined to accept the evidence of the chemist as I find no reason to reject his evidence at this stage of the proceedings, applying the principles set out in the case of *Balachandran*on prima facie case. I have dealt with the said principles in detail relating it to the law of evidence in my judgment in the case of CRA–41–20–2006-II, *PP v Mohd. Aszzid Abdullah* delivered on 18 June 2007 which I adopt here and I do not wish to repeat the same for the purpose of this case.

[17] I now must make a finding whether the prosecution has made a prima facie case to bring home the charge of trafficking under s 39B(1)(a) of the DDA which reads as follows:

No person shall, on his own behalf or on behalf of any other person, whether or not such other person is in Malaysia —

(a) traffic in a dangerous drug;.

[18] For the prosecution to succeed in each and every element of the offence, they must adduce sufficient evidence to support the fact in issue arising from the charge (see s 3 of the EA). Further, I must emphasis here that when it relates to death sentence, the burden on the prosecution is a heavy one for the right to live is an entrenched constitutional right captured in art 5(1) of the Federal Constitution which states: 'No person shall be deprived of his life or personal liberty save in accordance with law.'

[19] The accused, because of the fundamental protection in the Constitution that his life will be safe guarded according to law, need not say anything if he so chooses. His life can only be taken away according to law and nothing less.

[20] From the facts of this case, the prosecution has no iota of evidence to ground the charge for trafficking. The prosecution's evidence is simply that the accused was found alone in a room with drugs and the weight of the drugs attracts death penalty. The court must infer possession to attract s 37(da) to bring home the charge of trafficking. He must be sentenced to death.

[21] For the charge of trafficking to succeed, the prosecution must establish possession as well as trafficking as set out in s 2 of the DDA. The prosecution in this case cannot rely on double presumption in view of the celebrated decision in *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273 which was affirmed by a seven member panel of the Federal Court (with one judge dissenting) in *Public Prosecutor v Tan Tatt Eek & other appeals* [2005] 2 MLJ 685 where it was reaffirmed that the presumption of possession under s 37(d) of DDA 1952 could not be applied to invoke the presumption of trafficking under s 37(da) of the DDA.

[22] Further, in this case the prosecution did not adduce any evidence of trafficking as set out in s 2 of the DDA and in consequence, the principles enunciated in the Federal Court case of *Public Prosecutor v Abdul Manaf bin Mohamed Hassan* [2006] 3 MLJ 193 will not be applicable in this case. In that case, the Federal Court held that:

> (1) The decision in Muhammed bin Hassan v Public Prosecutor [1998] 2 MLJ 273 only prohibits the use of double presumptions under ss 37(d) and 37(da) of the Act. It is, therefore, open to the prosecution to rely on either of the presumptions. In other words, the prosecution may positively prove possession without relying on the presumption under s 37(d) of the Act and go on to rely on the presumption of trafficking under s 37(da) of the Act to support charge under s 39B of the Act. Conversely, the prosecution may rely on the presumption under s 37(d) to prove possession and seek to prove b affirmative evidence (independent of the presumption under s 37(da) that the accused was in fact trafficking in the dangerous drugs.

[23] For reasons stated above, I find the elements of the offence for trafficking as set out in s 39B(1)(a) to be read with s 2 of the DDA has not been made out. However, I find that the prosecution has proven custody or control of dangerous drugs, and the only issue I have to determine is whether he had knowledge whether the green bag contained the said drugs. It is now trite that the prosecution need not prove that the accused had knowledge of the nature of the drug, when invoking s 37(d) of the DDA which says that:

> In all proceedings under this Act or any regulation made thereunder —
>
> ...
>
> (d) any person who is found to have had in custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be deemed to have been in possession of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug;.

[24] This proposition was well articulated by Abdul Kadir Sulaiman JCA (as he then was) in *Reza Mohd Shah Ahmad Shah v Public Prosecutor* [2005] 4 CLJ 581, where the learned judge held:

> (1) The learned judge was incorrect in saying that there was no necessity for the prosecution to prove that the appellant had knowledge of the nature of the drug. By the operation of the Act, in relation to the charge, it was necessary for the prosecution to prove directly or inferentially that the appellant had knowledge of the nature of the dangerous drug he was carrying. On the facts, short of invoking the statutory presumption provided by s 37(d) of the Act upon the conduct of the appellant, no prima facie case had been made out against the appellant that he was in possession of cannabis with the requisite knowledge. In the circumstances, the issue of trafficking in the said dangerous drug would not at all arise as the issue of possession of the drug by the appellant was not made out by the prosecution, and since there was no express, affirmative finding of possession as understood in criminal law but for the legal presumption under s 7(d) of the Act, the appellant could not be called to enter his defence on the trafficking charge (pp 588 d, 589 b, d & 591a).
>
> (2) However, with the aid of the statutory presumption under s 37(d) of the Act, the prosecution had made out a prima facie case against the appellant for an offence under s 6

of the Act for being in possession of cannabis, and as the weight of cannabis involved was more than 50 grams, he was liable to be punished under s.39A(2) of the Act if found guilty. Consequently, the appellant ought to have been called to enter his defence for such possession. (p 589 e–f).

[25] I take the view for this case that only with the aid of the statutory presumption under s 37(d), the prosecution can establish a prima facie case against the accused for an offence under s 12(2) of the DDA which reads as follows:

No person shall have in his possession, custody or control any dangerous drug to which this Part applies unless he is authorized to be in possession, custody or control of such drug or is deemed to be so authorized under this Act or the regulations made thereunder.

and can be punished under s 39A(2) with imprisonment for life or for a term which shall not be less than five years and also be punished with whipping of not less than 10 strokes. Further, I take the view that for any law relating to capital punishment, life cannot be taken purely as a result of inference of a judge, as art 5 of the Federal Constitution says according to law. Inference in capital punishment cases cannot be equated to law unless that inference made by the judge is one beyond reasonable doubt will lead to only one adverse conclusion against the accused. In drug cases, for the prosecution to drive home the offence of trafficking, it will be within constitutional guidelines to show direct evidence of trafficking and this can in my view to some extent can be achieved by leading evidence as to motive as set out in s 8 of the EA. Prosecution in drug trafficking cases often omits to introduce evidence of motive and shifts the burden on the shoulders of judges to infer knowledge of the drug to establish possession which will result in death sentence. I think that is wrong. I do not wish to elaborate on this issue further in this case as I find no evidence of trafficking and there was no argument put before me citing the views of judges and sages of law on this issue. In addition, I am not here armed with necessary materials on Constitutional doctrine to throw more light to substantiate my views at this stage. But from the few books I hold closely, I can safely say such inference is not good evidence and as such is not compatible with religious principles of major faiths which is articulated in Rukun Negara, the 1st principle being 'Belief in God'. In this context, I believe the prosecution has a constitutional duty and obligation within the intent and spirit of Rukun Negara to make sure in drug trafficking cases to show good evidence according to law to convict a person and not shift the thrust on the judge to infer knowledge and then to rely on other provisions of the DDA to convict for trafficking. It will be more prudent for the prosecution to adduce direct evidence which they could if proper investigation and surveillance is done as being achieved in other jurisdiction. To invite inference from the judge to link a charge of trafficking in actual fact will have low probative value and will not pass the maximum evaluation test as propounded by the Federal Court in *Balachandran*. The learned judge Augustine Paul FCJ has as early as 1999 had anchored the argument in relation to prima facie case in *Public Prosecutor v Dato' Seri Anwar Ibrahim*. I will say for any thing less than taking a life, prosecution may rely on presumptions but when it comes to life it cannot be purely based on inference when the law gives the prosecution every opportunity to prove the case by direct evidence, including motive which will have strong probative value contrast to inference. Much scholarship has been advanced in the area of law of drugs by Professor Dr Rani Kamarudin, who is now one of the Deputy Dean in International Islamic University Malaysia, particularly in his PhD

thesis titled *Legal Aspects of the Control and Prevention of Dangerous Drugs Misuse — Comparative Study of Malaysian and English Law*. Some support for my proposition can be found in the case of *Mohamed bin Hassan* where the Federal Court asserted that 'In our view, to constitute 'possession' under s 37(da) of the Act, so as to be capable of forming one of the ingredients thereunder thereby giving rise to the presumption of trafficking, there must be an express affirmative finding (as opposed to legal presumption) of the possession as understood in criminal law, based on evidence'.

[26] Since the prosecution has failed to establish a prima facie case for trafficking, the accused is entitled in law to seek for an acquittal. However, in this case, I am exercising my discretion to amend the charge on the grounds of public interest to ensure proper measures are taken to curb drug offences. For this purpose, I am amending the charge to one of possession under s 12(2) of the DDA. And to effectively to do so, I am inviting the prosecution to propose the suitable amendments to the charge to enable me to direct that the amended charge be read to the accused and a plea be taken. I shall thereafter proceed to make the necessary orders in relation to these proceedings.

Charge amended to possession under s 12(2) of the DDA.

Reported by Chew Phye Ken